IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 350

ALL SERVICE LAUNDRY CORPORATION,
Petitioner,

against

LILLIAN MAUD PHILLIPS, as Administratrix of the goods, chattels and credits of Clifford R. Phillips, deceased, JOSEPH BONURA, TONY ZUMMO, TONY SALADINO, CHARLES SALADINO, PHILIP PERRI, ALBERT JETT, DANNY FANTO, THELMA DOUGLAS, ADA BERKELEY, individually and on behalf of all other employees of defendant similarly situated,
Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below

The opinion of the District Court is reported in 51 F. Supp. 238 (R. 18-20). The unanimous opinion of the Circuit Court of Appeals, affirming the judgment of the Trial Court, is reported in 149 F. (2d) 416 (R. 47-54).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on June 2, 1945 (R. 60). Jurisdiction has been invoked under Section 240(2) of the Judicial Code, as amended by the Act of February 13, 1925 (Pet. for Writ, p. 2).

Questions Presented

The petitioner has not specified any question with regard to whether respondents were employees "engaged in the production of goods for commerce". The only questions presented are:

1. Is petitioner a "service establishment" within the meaning of Sec. 13(a)(2)?

2. Are the garments processed and laundered by the respondents "goods" under Sec. 3(i)?

3. Have the respondents met the test of substantiality where 4% of the processed and laundered garments move "regularly and continuously each week" in interstate commerce?

The applicable statutory provisions are Secs. 3(i), 13(a)(2) (set forth on p. 3 of the Pet. for Writ), and 15(a)(1)[1] of the Fair Labor Standards Act (hereinafter referred to as the "Act"; 52 Stat. 1060; 29 U. S. C. Sec. 201 et seq.).

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[1] Sec. 15(a)(1) of the Act makes it unlawful "to transport, offer for transportation, ship, deliver or sell in commerce, or to ship, deliver or sell with knowledge, that the shipment or delivery or sale thereof in commerce is intended, in goods in the production of which any employee was employed in violation of Sec. 6 or 7 * * *".

Statement

All of the facts were stipulated. The respondents were employed as pressers and manglers by the petitioner, All Service Laundry Corp. (hereinafter referred to as "All Service") (R. 15, 16). The respondents' work consisted of operating machines which pressed washed linens, overalls, slacks, coats, pants, union suits, and hoovers, owned by Star Overall Dry Cleaning Laundry Company, Inc. (hereinafter referred to as "Star Overall") (R. 15-16, 22).

Star Overall rented the aforesaid garments, for a fee, to customers, including individuals and firms in various industrial and commercial businesses, such as telephone companies, insurance companies, railroads, bus companies, and airlines (R. 16). 18% of Star Overall's business was in bulk, i.e., laundry used by more than one individual (R. 13).

All Service did substantially all of the cleaning, pressing and laundering of the aforesaid garments for Star Overall (R. 16, 21). 80% of All Service's work of cleaning, pressing and laundering the garments was for Star Overall (R. 15).

"Regularly and continuously each week", 5% of the aforesaid garments of Star Overall, which were worked on and handled by the respondents, was delivered in interstate commerce (R. 11, 15, 22). Thus, 4% of the aforesaid garments worked upon, handled and pressed by the respondents (80% of 5%), regularly and continuously each week was shipped and delivered in interstate commerce.

The customers of Star had the physical possession of the goods only temporarily and returned them to Star after they became dirty. Star, in turn, delivered them to All Service for processing. While it may be true that Star's customers were the ultimate consumers, no delivery to them but for a special and limited purpose was shown. Star merely surrendered possession and regained possession at intervals while using the garments in conducting its own business.

ARGUMENT

I

The Circuit Court's decision is not in conflict with the Circuit Court of Appeals for the Sixth Circuit, in *Lonas* v. *National Linen Service Corp.*, and in *Martino* v. *Michigan Window Cleaning Co.* The exemption contained in Sec. 13(a)(2) applies only to a service establishment selling services in small quantities to the consuming public.

The petitioner in its writ (p. 11), in quoting from the decision of the Circuit Court, seeks to create the impression that the Circuit Court chose between conflicting views expressed by the Sixth Circuit and other circuits. The petitioner does not quote the last sentence of the paragraph of the Circuit Court's opinion, which states:

> "We do not now find it necessary to follow either one or the other of these conflicting views" (R. 52).

Assuming, *arguendo*, that a dispute exists between the various circuits as to whether the word "or", as contained in 13(a)(2) of the Act, should be read in the disjunctive or conjunctive, nevertheless the Circuit Court did not accept either one of these theories, but decided the case on the theory, as enunciated by this Court, that the purpose of Sec. 13(a)(2) was to make sure that employees working for local retailers near State lines who might not themselves be employed in a "local retailing capacity" so as to be exempted under Sec. 13(a)(1), would be exempted anyway. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; *A. H. Phillips, Inc.* v. *Walling*, 323 U. S. ____; *Guess* v. *Montague*, 140 F. (2d) 500 (C. C. A. 4). The appellate courts have considered Sec. 13(a)(2) applicable to establishments similar in every way to a retail store, but selling

services rather than goods, in small quantities to the consuming public.[2]

It is clear that the exemption of Sec. 13(a)(2) was to take care of a small retailer near the State line and not a commercial laundry serving another laundry at wholesale. The requirements of Sec. 13(a)(2) are not met by the petitioner, which is engaged principally in servicing a linen supply company at wholesale where the linen supply company in turn, for a fee, rents the garments to commercial and industrial users. Here the petitioner is not engaged in making small sales in small quantities to the consuming public. The petitioner has only one substantial customer, which provides more than 80% of its business. Thus, the Circuit Court of Appeals decision is not in conflict with *Lonas* v. *National Linen Service Co.*, 136 F. (2d) 433, and *Martino* v. *Michigan Window Cleaning Co.*, 145 F. (2d) 163 (see Judge Clark's concurring opinion wherein he states that the decision in the case at bar "accords further with the views on cases such as" the *Lonas* and *Martino* cases). In the *Lonas* case it is clear that the laundry was soliciting the patronage of the general public and its activities were primarily devoted to serving the community and public generally. Clearly, on the facts, the *Lonas* case is distinguishable from the case at bar. All Service did substantially all of its business with Star Overall. All Service's activities were devoted primarily to serving Star Overall, and it did not come in contact with the public generally.

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[2] *Fleming* v. *Arsenal Bldg. Corp.*, 125 F. (2d) 278, 280; *Fleming* v. *A. B. Kirschbaum Co.*, 124 F. (2d) 567, 572-573; *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 526; *Walling* v. *Sondock*, 132 F. (2d) 77, cert. den. 63 Sup. Ct. 769; *Guess* v. *Montague*, 140 F. (2d) 500, 503; *Collins* v. *Kidd Dairy & Ice Co.*, 132 F. (2d) 79 (C. C. A. 5); *Walling* v. *Sun Publishing Co.*, 140 F. (2d) 445 (C. C. A. 6); *Consolidated Timber Co.* v. *Womack*, 132 F. (2d) 101; *Reynolds* v. *Salt River Valley Water Users Assn.*, 143 F. (2d) 863 (C. C. A. 9), cert. den. Nov. 6, 1944.

Exemptions from this statute must be strictly construed. The petitioner has the burden of pleading and proving such exemptions, and if there is any doubt as to the applicability of the exemption, it must be resolved against the petitioner.[3]

The petitioner places reliance upon correspondence between Congressman Hartley and the Wage & Hour Administrator (Pet. for Writ, p. 11). The Administrator of the Wage & Hour Division has, at all times, emphasized that any informal releases (as distinguished from formal interpretive bulletins), issued by him, are with respect to the enforcement policy of the Wage & Hour Division, and do not represent an interpretation of the Act, nor do they preclude recovery in employee suits under Sec. 16(b) of the Act. The Administrator, in fact, put in a brief amicus curiae, in support of the respondents' recovery in the case at bar, on the respondents' petition for rehearing in the Circuit Court of Appeals (see Judge Clark's concurring opinion, R. 54).

II

The exclusionary clause in the definition of "goods" was not intended to limit the scope of the phrase "production of goods for commerce", but merely to protect the ultimate consumer of goods from being subject to the penalties for violation of Sec. 15(a)(1).

The purpose of the exclusionary clause in Sec. 3(i) was to make clear that the purchasing consumer should not be held responsible because of violations of the Act by an employer who produced an item of the consumer's personal property which he might carry with him out of the State.

[3] *Walling* v. *Reid*, 139 F. (2d) 323 (C. C. A. 8); *Stratton* v. *Farmers Produce Co.*, 134 F. (2d) 825 (C. C. A. 8); *Bush* v. *Wilson & Co.*, 157 Kan. 82, 138 Pac. (2d) 457 (Sup. Ct. Kan.); *Helena Glendale Ferry Co.* v. *Walling*, 132 F. (2d) 616 (C. C. A. 8); *Thornberg* v. *E. Tenn. & W. N. C. Motor Transport Co.*, 157 S. W. (2d) 823 (Sup. Ct. Tenn.).

Certainly it was not intended to exempt the producing employer himself from the consequences of his failure to meet the statutory standards when working on the goods. The plain language of the clause indicates that respondents' work was performed before and not after the delivery of the goods (laundered garments) "into the actual physical possession of the ultimate consumer thereof". And, in any event, where, after its delivery to an ultimate consumer, an article is withdrawn for further processing or reprocessing, the words "after delivery", etc., refer to the delivery of the reprocessed article to its user, and not to the original delivery of the article before its withdrawal for further processing.

The courts have uniformly recognized, and no Circuit Court has ruled otherwise, that the clause merely "exempts the ultimate consumer from the penalties of Sec. 15(a)(1) and has no effect in limiting the scope of the Act as to the producers of goods intended for shipment in interstate commerce".[4] In other words, the clause was inserted in the statute "so that interstate transportation of goods may take place without responsibility for a prior production in violation of the standards of the Act".[5]

The legislative history,[6] as well as the language of the Act, when read in its entirety, demonstrate beyond any

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[4] *Chapman* v. *Home Ice Co.*, 136 F. (2d) 353, 355 (C. C. A. 6), cert. den. 320 U. S. 761.

[5] See *Hamlet Ice Co.* v. *Fleming*, 127 F. (2d) 165, 171 (C. C. A. 4), cert. den. 317 U. S. 634; *Enterprise Box Co.* v. *Walling*, 125 F. (2d) 897, 899 (C. C. A. 5), cert. den. 316 U. S. 704; *Atlantic Co.* v. *Walling*, 131 F. (2d) 518 (C. C. A. 5).

[6] See statement of Assistant Attorney General (now Mr. Justice) Jackson, before the Joint Committee of the Senate Committee on Education & Labor, and House Committee on Labor, Hearings Before Joint Committee, etc., on S. 2475, 75th Cong. 1st sess. (1937), p. 2. See also statement of Congressman Healey, id., p. 833. The Congressional concern lest the broad provisions of the Act result in the punishment of persons not responsible for, nor even aware of, the failure to observe the statutory standards, was repeatedly manifested at the hearings on the bill (Hearings Before Joint Committee, etc., supra, pp. 67, 70, 74), and the exclusionary clause in the definition of

doubt that only transportation of the goods by the ultimate consumer is within the scope of the exclusionary language.[7] By inserting the exclusionary clause in Sec. 3(i) Congress expressed its intention not to hold the ultimate consumer as a violator of Sec. 15(a)(1) for transporting "hot goods" across State lines. Otherwise, the ultimate consumer would be responsible for the wages and hours of employees who produced any item of his personal property which he might carry with him out of the State.

All of the Circuit Courts have recognized that this is the purpose of the exclusionary clause, and that, being for the benefit of the ultimate consumer, it cannot be invoked

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"goods" is simply a manifestation of that concern. The bill, as originally drafted, left no doubt whatsoever, that only the ultimate consumer was to be protected. It provided, simply, that "goods" "shall not mean goods in the possession of the ultimate consumer thereof". (S. 2475, introduced in the Senate on May 24, 1937, 75th Cong., 1st sess., Sec. 2(a)(21).) The purpose and effect of this provision were generally recognized by both the proponents and opponents of the bill, as freeing "the ultimate consumer from any criminal liability for any part he might play in the interstate transportation of such unfair goods". See Statement of Joseph A. Emery, General Counsel, National Association of Manufacturers, Hearings Before Joint Committee, etc., supra, p. 639. See also statement of George H. Davis, president, Chamber of Commerce of the United States, id., p. 937.

While the definition of "goods" was extended and clarified by the Senate Committee, it is clear that the purpose and effect of the exclusionary clause remained unchanged. The revisions were made apparently as a result of the criticisms directed at the ambiguity of the definition with regard to its application to intangibles such as "stocks, bonds, etc." See Hearings Before Joint Committee, etc., supra, p. 524. Recognizing that the ultimate consumer might also be a producer of goods, Congress unequivocally expressed its judgment that any productive activities of the ultimate consumer should not be exempt from the Act.

[7] It may be noted that exemptions from this Act are "subject to strict construction". *A. H. Phillips* v. *Walling*, 323 U. S. ; *Bowie* v. *Gonzalez*, 117 F. (2d) 11 (C. C. A. 1); *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52 (C. C. A. 8); *Miller Hatcheries* v. *Boyer*, 131 F. (2d) 283 (C. C. A. 8); *Ralph Knight* v. *Mantel*, 135 F. (2d) 320 (C. C. A. 8).

by a producer.[8] This is made particularly clear by the insertion in the definition of the words "other than a producer, manufacturer, or a processor thereof". There can be no question but that the respondents' activities were clearly within the broad scope of the definition of the word "produced" contained in Sec. 3(j) of the Act.[9] In fact, the petitioner has not brought up for review the decision of the Circuit Court that the respondents were engaged in producing, and that therefore the petitioner was a processor or producer.

Moreover, in any event, the term "ultimate consumer" does not negate the possibility of subsequent withdrawal of the article from the "ultimate consumer's" possession for *further processing or reprocessing*, and its later delivery to the same or other "ultimate consumers". A suit of clothes, which is worn out by its owner, and sold to a peddler, may be subsequently rehabilitated by a company specializing in the repair of old clothes and sold to a new "ultimate consumer". See and cf. *Walling* v. *Belikoff*, 147 F. (2d) 1008 (C. C. A. 2); *Campbell* v. *Zavelo*, 10 So. (2d) 29 (Ala., 1942). A sewing machine may be junked as scrap and eventually become part of a liberty ship. See, e.g., *Bracey* v. *Luray*, 138 F. (2d) 8 (C. C. A. 4). Very often the same piece of goods may undergo a number of successive productive processes followed by successive deliveries to one or more "ultimate consumers". While the

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[8] The Administrator of the Wage & Hour Division has long adhered to this view. See Interpretive Bulletin No. 5, U. S. Department of Labor, Wage & Hour Division, Oct. 1940, par. 6, 1940 Wage-Hour Manual 133. The Supreme Court has reiterated the principle that the Administrator's bulletins should be given considerable weight by the Courts. See *U. S.* v. *American Trucking Ass'ns*, 310 U. S. 534, 549.

[9] "Produced" is defined as "produced, manufactured, mined, handled * * * and for the purposes of this Act, an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any process or occupation necessary to the production thereof * * *."

processing operations performed by the respondents were carried on, after the original delivery of the garments to their then "ultimate consumer", they took place before the delivery of a "new" article (cleaned, washed, processed and laundered overalls, again made wearable) to their new "ultimate consumer". The fact that the new consumer may happen to be the same person as the original consumer is purely incidental.[10]

The Courts have uniformly recognized the limited purpose and effect of the "ultimate consumer" clause, and have also consistently held the Act applicable in just the sort of situation as that presented here. In all of these cases articles which at one time had been delivered to their "ultimate consumer" were subsequently delivered by that consumer to a producer, manufacturer or processor who made them again wearable or usable and endowed them with new qualities.[11]

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[10] Many of the garments are owned by Star Overall, which rents them to industrial and commercial firms, which in turn issue them to their workers. The ultimate consumers of these garments are the workers who wear them; and it is most unlikely that the same firms get the same uniforms from the laundry, or that the same workers wear the same garments at all times.

[11] *Walling* v. *Belikoff*, 147 F. (2d) 1008 (C. C. A. 2), repair and alteration of secondhand clothes, and sales to new customers. *Bracey* v. *Luray*, 138 F. (2d) 8 (C. C. A. 4), junk yard selling scrap iron. *Campbell* v. *Zavelo*, 10 So. (2d) 29 (Ala., 1942), repair of secondhand shoes for the Army. *Slover* v. *Wathen*, 140 F. (2d) 258 (C. C. A. 4), repair of barges. *Orange Crush Bottling Co.* v. *Tuggle*, 27 S. E. (2d) 769 (C. A. Ga., 1943), purchase and collection of empty beer bottles. *Hertz Drivurself Stations, Inc.* v. *U. S.*, ... F. (2d) ..... (C. C. A. 8), 8 Wage-Hour Rept. 900, not yet officially reported, maintaining and servicing of trucks leased for interstate commerce. *Guess* v. *Montague*, 140 F. (2d) 500 (C. C. A. 4), repair of machinery for customers.

III

The respondents' functions have met the test of substantiality, and the respondents are entitled to the benefits of the Act where 4% of the goods was regularly and continuously each week distributed in interstate commerce.

Any necessary test of substantiality is met under the authority of many cases holding that the Fair Labor Standards Act does not depend on the percentage or volume of goods moving in interstate commerce. The Courts have uniformly held that it is sufficient if the flow is not casual, sporadic, or utterly inconsequential. The Courts have permitted recovery where the percentage or volume of goods moving in interstate commerce was the same or less than the 4% involved in this case. *U. S.* v. *Darby,* 312 U. S. 100, 123; *Walling* v. *Peoples Packing Co.,* 132 F. (2d) 236 (C. C. A. 10), cert. den. 318 U. S. 774; *Schmidt* v. *Peoples Telephone Union,* 138 F. (2d) 13 (C. C. A. 8); *New Mexico Public Service Co.* v. *Engel,* 145 F. (2d) 636, 640 (C. C. A. 10); *Sun Pub. Co.* v. *Walling,* 140 F. (2d) 445, 448 (C. C. A. 6), cert. den. 322 U. S. 728; *So. Cal. Freight Forwarders* v. *McKeown,* 148 F. (2d) 890 (C. C. A. 9); *Sykes* v. *Lochmann,* 156 Kan. 223, 132 Pac. (2d) 620 (Sup. Ct. Kan., 1943); *Chapman* v. *Home Ice Co.,* 136 F. (2d) 353 (C. C. A. 6), cert. den. 320 U. S. 761.

The Supreme Court, in *U. S.* v. *Darby,* supra, said:

> "Congress * * * has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present-day industry, competition by a small part may affect the whole and the total effect of the competition of many small producers may be great * * * the legislation aimed at a whole embraces all its parts."

The Fair Labor Standards Act makes no distinction as to the volume of shipment in commerce, or amount of shipments in commerce, or in production for commerce, by any particular shipper or producer. It is immaterial from the viewpoint of national concern in protecting interstate commerce and protecting its channels to be used to spread sub-standard labor conditions by competitive pressure, to the injury of that commerce, that the shipments in such commerce do not constitute the major product of the producer.

The stipulated facts indicate that "regularly and continuously each week" 4% of the goods produced by the respondents moved into the channels of interstate commerce. Such a regular and continuous flow is not casual or sporadic and certainly cannot come under the maxim *de minimis non curat lex.* While the petitioner cites various cases (Pet. for Writ, p. 10) with respect to the test of substantiality, it does not claim that there is any divergence in the circuits as to what constitutes a substantial amount of production for interstate commerce. On the contrary, the cases uniformly hold that the applicability of the Act does not depend on the percentage or volume of goods, but on whether the percentage or volume is regular and recurrent, as it is in the present case.

IV

There is here presented no novel, substantial or important question of construction of a Federal statute not heretofore determined by this Court, nor is the decision of the Second Circuit in conflict with applicable decisions of this Court or of the other circuits.

CONCLUSION

No adequate reason is set forth in the petition for the granting of a writ of certiorari and application therefor should be denied.

Respectfully submitted,

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